

Missouri Medical Malpractice Joint Underwriting Association

Minutes for the Meeting of May 19, 2004

Location: Room 460, Governor Office Building
200 Madison Street
Jefferson City, Missouri

Time: 8:00 a.m.

Attending: Bill Turley, Chairman [Shelter Insurance Companies/NAII]*
(Board) Don Ainsworth [Safety National Casualty Corp/the Alliance]
Paul Blume (*via teleconference*) [AIG/Unaffiliated Companies]
Craig Kjellberg [State Farm Ins./Unaffiliated Cos.]
Dave Monaghan [American Family Insurance/NAII]
Dennis Smith [Missouri Employers Mutual/AIA]
Patty Williamson (*via teleconference*) [Uhlemeyer Services, Inc./AIA]

(MDI Staff) Marsha Mills, Deputy Director, Missouri Department of Insurance (MDI)
Kevin Jones, General Counsel, MDI
Linda Bohrer, Director, MDI Division of Market Regulation
Susan Schulte, Chief, MDI Property & Casualty Section
Mark Doerner, Senior Counsel, MDI P&C Section

(Audience) Keith Wenzel, Hendren & Andrae
Jean-Paul Rebillard, Marsh
Mike Granacher, Marsh
Sheryl Manger, Marsh
Andrew Teigen, Marsh
Jim Vaccarino, (*via teleconference*) Marsh

Chairman Turley started the meeting at approximately 8:00 a.m. with a discussion of the first agenda item, which was a report on JUA-related legislation following the end of the regular legislative session the prior week. Dave Monaghan reported that he was aware of no JUA-related legislation that passed both houses of the General Assembly. Representatives of MDI agreed.

* Material in brackets following the names of Board members indicate the insurance companies they work for and then the insurance industry trade groups that they are representing under Section 383.175, RSMo.

Next, Chairman Turley gave a brief update on the negotiations between the JUA Board and Marsh regarding the primary service company contract. He indicated that the Executive Committee of the Board had yet to come to an agreement with Marsh, but that negotiations would continue. He asked whether the other Board members wanted to become involved in the negotiations but the consensus was to have the Executive Committee continue the negotiations.

Chairman Turley then discussed the actuarial services contract with Tillinghast. Andrew Teigen of Marsh passed out a packet containing various materials, indicating that the draft Tillinghast contract was in the packet, having been forwarded by Tillinghast to Marsh for distribution. Chairman Turley suggested that the Executive Committee would continue to work on this contract too.

The next agenda item was the treatment of the additional first year charge (or “surcharge”) required under Section 383.165, RSMo. The Board’s attorney, Keith Wenzel discussed an opinion letter he had written on the matter, the essence of which was that the Board could not completely waive the surcharge, but they could accept a letter of credit or a promissory note. Keith also suggested the requirement in Section 383.160 that the JUA consider investment income in developing its rates meant that any non-cash surcharge payments should also require the payment to the JUA of interest income.

The Board then discussed the issue of the surcharge in general. Don Ainsworth asked the Marsh representatives about the \$30+ million that had been collected in Rhode Island that is now “just sitting there.” Jim Vaccarino said the Rhode Island insurance regulator’s position was to keep the funds on hand until after the JUA’s operations were wound up at some unknown date in the future, at which time the surcharge funds would be used to pay off any debts of the JUA that were otherwise unpaid. Only then would any leftover surplus amounts be returned to the policyholders. Dennis Smith indicated that something similar was done when the state of Maine established its workers’ compensation fund.

Chairman Turley asked if the JUA could keep the surcharge for a period but then return it to the policyholders who paid it as a rate reduction, assuming proper records were kept. The Marsh representative felt this could be done, although they thought the Department might be concerned that doing so would reduce the JUA’s ability to weather a future turn in the market’s “insurance cycle.” The Chairman indicated his concern that while the statute requires the surcharge to be paid, it is silent as to whether it can be returned. Dennis Smith interpreted the legislative intent behind that provision as the method by which the JUA was to develop a “surplus.” After further discussion of various ways the surcharge could be treated, the Chairman indicated the Board members seemed to be in agreement that the JUA had to collect the surcharge, in some fashion, with the payment method offering the option of paying via a promissory note. Dennis Smith pointed out that the extra cost would make it less likely that a large number of health care providers would seek out the JUA. Chairman Turley suggested that perhaps providers would be drawn to the “occurrence” policies the JUA would write, since his discussions had led him to conclude there was a “demand” for this form of coverage.

Jim Vaccarino suggested that it would be reasonable to interpret the statute to say that the initial first year surcharge could be refunded at some point in the future when it was determined the funds were no longer needed to maintain the viability of the JUA. MDI staff suggested that the 2-year statute of limitations on most medical malpractice claims would mean that the JUA should have a good idea after a few years as to whether amounts beyond the premiums collected would be needed to fund the JUA's liabilities. In the meantime, the surcharge would need to be collected and, for non-cash payments, interest at some "rate" would need to be collected. Jim Vaccarino requested that Keith Wenzel write a formal notice to insureds about the surcharge to explain the conditions of the note, including any refund thereof. Dave Monaghan indicated that he thought doing so at this point in time would be difficult, because we really don't know what will happen in the future vis-à-vis any surcharge refund. After some additional discussion, the Chairman decided to move on.

The next agenda item involved other legal efforts regarding the JUA's coverage, specifically a declaratory judgment action seeking a court ruling on the JUA's ability to make "claims-made" coverage available. Keith indicated he had prepared a draft petition that he had circulated among select Board members and the Department. Chairman Turley recapped that he and Dave Monaghan had concluded independently of one another that the statute in question (383.160, RSMo) was no prohibition to such coverage. Specifically, subsection 1 of that section provides that the JUA's policies "...shall be written so as to apply to injury which results from acts or omissions occurring during the policy period."

Chairman Turley indicated that, historically, such a requirement has in fact been part of medical malpractice claims-made policies. He recognized that the same was not true of many non-medical malpractice claims-made policies, the main requirement of which was that the claim be reported (or "made") during the policy period, regardless of when the insured event occurred. However, with classic medical malpractice claims-made policies, coverage is typically provided when the act causing injury occurs during the policy period *and* is reported during that period. He indicated that he reviewed the policy forms of a number of carriers and they all had these two elements. Thus, the requirement in the Section 383.160 that a JUA policy be written to cover an injury which results from acts or omissions occurring during the policy period is met by both the historic "occurrence" policy and also the classic med mal claims-made policy, the only distinction being that the latter type of policy has also had another requirement (i.e., reporting of a claim during the policy period) not mentioned in the statute. The purpose of the declaratory judgment action would be to verify whether the statute allows the JUA to issue this latter form of coverage. The Chairman asked for a vote to proceed with the declaratory judgment action. A motion to proceed was made by Don Ainsworth and second by Patti Williamson; the motion passed on a voice vote, with no opposition.

Next, the Board took up the Minutes from the April 12 meeting. Sheryl Manger of Marsh suggested the discussion of providing "general liability" coverage as an incidental coverage be modified to delete a reference to coverage of "autos" since this is not

something typically covered by GL policies. MDI staff indicated that it would remove the reference to auto coverage in the draft Minutes, and with that change, the Board approved them on a voice vote.

The Chairman moved on to a number of issues that Marsh wanted to address, but before the Marsh representatives got into the substance these, Board member Paul Blume indicated he had to drop off of the teleconference. Thereupon, Sheryl Manger of Marsh began her review of issues by discussing the underwriting manual. She indicated the draft document Marsh had previously circulated would be amended to reflect the fact that only “occurrence” policies were being offered through the JUA.

She then discussed the issue of agent commissions. She indicated that a “5%” commission would be within the mainstream paid for this line of coverage. After discussion, the Board decided that setting the commission rate was important enough to require a vote: Dennis Smith moved and Don Ainsworth seconded a motion that the commission be a flat 5% of premium, with not cap based on the amount of premium; the motion carried on a voice vote with no opposition. Sheryl then indicated the manual makes clear there is no credit to a health care provider for going directly to the JUA, bypassing an agent; the 5% reimbursement is built into the rates.

Next, Sheryl discussed the draft manual’s provisions on cancellation. Marsh proposed that if a policy had to be cancelled more than one time in a policy period, the policy will not be reinstated without full payment of premium. (In other words, after the second non-payment, a policyholder would lose the option of spreading the premium out over time under the 40/30/30 payment option for premium over \$10,000.)

Continuing, Sheryl mentioned that the policy forms and manuals would be filed with the Department for review. Department staff discussed the review process and said they would work with Marsh on the review process. Sheryl then indicated a need to clarify the language on coverage for “facilities” in the manual, and then she discussed a number of specific provisions in the various policies they had presented to the Department for review.

She discussed the issue of a lockbox and the difficulties in getting one set up. There was apparently a difference of opinion among the various banks Marsh talked to as to what type of authorization would be required in order to set one up.

The Board then discussed once again the issue of the Board’s indemnification. Chairman Turley said the Plan of Operations already provided coverage for the Board’s actions in furtherance of the JUA, but he recognized there might be a heightened concern to the extent funds were being handled. After some additional discussion, this item was tabled for future discussion.

Chairman Turley then went on to the “miscellaneous” category of the agenda. Andrew Teigen of Marsh discussed notification of the public of the existence of the JUA. While the Plan of Operations prohibits the JUA from “advertising,” it was still necessary to let

the public know of the JUA's availability. A web site was one method of doing this; a press release from the Department was another. When to provide this information was discussed. Marsh indicated that Tillinghast was on track to have the preliminary occurrence rates by June 1, which would be run by the Department thereafter, but which technically are regulated under a "use and file" regime. Some form of press release after that point, when the web site was also up and running, was indicated as a goal.

Chairman Turley brought up the fact that the Department's recent medical malpractice legislation had included in alternative name for the entity other than "JUA," specifically, the MEDIC Program (an acronym for Malpractice Education, Data and Insurance Capacity Program). The Board discussed whether such an alternative name was appropriate. The Chairman had a concern that the label "Joint Underwriting Association" might carry a negative connotation for some doctors. Dennis Smith suggested that the term "MEDIC" was probably already in use in the state, and might have some form of trademark protection. Alternative names were offered. Marsh was asked to check on name availability and was invited to explore alternative names. Sheryl pointed out that whatever name is used would need to be selected soon, so that it could be used on the web site and included in the web address.

Patty Williamson asked about the negotiations on Marsh's fee. The main elements of the compensation package at this point in the negotiations were:

- \$45,000 per month, but only to the extent funds were available to cover this amount, the amount being waived to the extent such funds were not available;
- \$250 per month for each open claim file;
- 10% of premium.

The Chairman indicated the main issue was whether Marsh would be reimbursed for the last element at a percentage of "written" premium (Marsh's preference) and "earned" premium (the Chairman's preference). The Chairman's objection was that a provider who cancelled before renewal would be due a return premium, even though the 10% fee had already been paid. Marsh said their intent was that the amount would be "net" of any return premium, regardless of how the language of the contract is written at this point. Jean-Paul Rebillard of Marsh said "written" premium was how they operated in all their other states. They prefer this approach because it matches revenues with expenses, since most of the expense to the administrator comes up-front, when the policy is underwritten and issued.

Patty Williamson asked for a clarification as to the monthly fee for open claims, voicing a concern that there would be no incentive for Marsh to close a claim. Jean-Paul agreed that they interpret the word "open" to mean "active," such that Marsh would not be paid for inactive files, which they would consider "dead" or "closed." He agreed to have the word "active" added to the contract.

Keith Wenzel mentioned another contract issue relating to adding "cross-indemnification" to mirror that in the Tillinghast contract, which the Chairman said was

acceptable to him. Otherwise, the Chairman said he would continue to argue with Marsh over the “written/earned” issue.

Patty asked about the Tillinghast contract on actuarial services. The Chairman voiced concern about the draft contract’s provision (increasingly common in various types of professional service arrangements) exonerating the firm from its own negligence so long as they return any reimbursement. Jean-Paul pointed out that, from a timing perspective, it would be best if the Board moves as soon as possible on the rates. In response, the Chairman suggested that, in the interest of moving the process along, and given the type of service they were providing, the problematic provision was not critical and perhaps the Tillinghast contract could be signed. They discussed the issue of late billing and whether funds would be available from the JUA to pay Tillinghast’s fee; Jim Varcarrino said they seem to bill on a quarterly basis anyway. At that point, the Chairman dropped his objection and received a motion from Dennis Smith, seconded by Craig Kjellberg to sign the contract. The motion passed on a voice vote without opposition.

Jean-Paul Rebillard of Marsh asked whether the Board had an official record-keeper (for documents like the Tillinghast contract). While the Board’s attorney could function in this capacity, for a number of items, such as the promissory notes, it seemed more workable to have Marsh keep the official records. On a motion made by Dennis Smith seconded by Dave Monaghan, and passed without opposition, Marsh was given that responsibility.

Jean-Paul discussed the selection of an institution to hold funds, and whether the entity should be local. Dennis Smith suggested the trustee to hold funds might be local while the investment adviser might be national. Then Jim Vacarrino came back on the line with Tom Hermes of Tillinghast to help plan the date for presenting the rates and having a meeting on same. He was told that rates would be needed for all providers for occurrence coverage, but to focus on physicians, plus “nose” coverage for prior acts. On the latter, he thought he could get rates by next Friday, May 28.

At Jean-Paul Rebillard’s suggestion, a follow-up meeting was scheduled for June 2nd at 10:00 a.m.. Dennis Smith offered the use of a large meeting room at the offices of his company, Missouri Employer’s Mutual, in Columbia Missouri.

Jean-Paul asked Jim Vaccarino whether the Marsh JUAs in other states were exempt from federal taxation. He said only New Hampshire was exempt, based on a decision by a district IRS administrator back in 1977. A discussion followed about whether the Missouri JUA would be subject to state premium or income tax, and federal income tax. The Board asked Keith to look into the matter. With that, the Board adjourned.